

1
2
3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA
6 RENO, NEVADA

7 ARROW ELECTRONICS, INC.,) 3:10-cv-00175-ECR-VPC
8)
9 Plaintiff,)
10 vs.) Order
11 NIGHT OPERATIONS SYSTEMS, INC.,)
12 Defendant.)
13

14 This case arises out of a dispute over payment for commercial
15 goods. Now pending is a motion for summary judgment (#23) filed by
16 Plaintiff. The motion is ripe, and we now rule on it.

17
18 I. Background

19 Plaintiff Arrow Electronics, Inc. ("Arrow" or "Plaintiff") is a
20 seller of electronic and computer products. (Memo. in Support of
21 Mot. for Summary Judgment ("Memo for MSJ") at 2 (#24).) Plaintiff
22 and Defendant Night Operations Systems, Inc. ("Night Operations" or
23 "Defendant") executed a credit agreement allowing Night Operations
24 to purchase electronic products from Arrow on credit. (Christensen
25 Decl. Ex. 1 at 1 (#24-1).) Between August 2009 and November 2009,
26 Night Operations ordered, and Arrow delivered, products subject to
27 the terms and conditions on the invoices. (Christensen Decl. Ex. 2
28 (#24-1).) It is undisputed that Night Operations did not pay for

1 the products that were ordered and delivered, or return them to
2 Arrow. (Opp. to Mot. for Summary Judgment ("Opp.") at 5 (27).)
3 Night Operations alleges, however, that Arrow's products were non-
4 conforming and delivered four weeks late. (Id. at 4-5.)

5 On March 29, 2010, Arrow filed a complaint (#1) against Night
6 Operations. On April 23, 2010, Arrow filed a motion for entry of
7 default (#7). On April 27, 2010, the Clerk entered default (#9) as
8 to Night Operations. On the same date, Night Operations filed an
9 answer (#10) to the complaint (#1). On June 7, 2010, Night
10 Operations filed a motion to set aside default (#16), and on August
11 6, 2010, Magistrate Judge Cooke granted (#22) the motion to set
12 aside default (#16). On September 14, 2010, Arrow filed a motion
13 for summary judgment (#23) along with a memorandum (#24) in support
14 of the motion. On October 15, 2010, Night Operations filed its
15 opposition (#26), and on October 22, 2010, Arrow replied (#28).
16 Oral argument was held for the matter on June 22, 2011.

17 18 **II. Standard of Review**

19 Summary judgment allows courts to avoid unnecessary trials
20 where no material factual dispute exists. N.W. Motorcycle Ass'n v.
21 U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court
22 must view the evidence and the inferences arising therefrom in the
23 light most favorable to the nonmoving party, Bagdadi v. Nazar, 84
24 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment
25 where no genuine issues of material fact remain in dispute and the
26 moving party is entitled to judgment as a matter of law. FED. R.
27 Civ. P. 56(c). Judgment as a matter of law is appropriate where

1 there is no legally sufficient evidentiary basis for a reasonable
2 jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where
3 reasonable minds could differ on the material facts at issue,
4 however, summary judgment should not be granted. Warren v. City of
5 Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct.
6 1261 (1996).

7 The moving party bears the burden of informing the court of the
8 basis for its motion, together with evidence demonstrating the
9 absence of any genuine issue of material fact. Celotex Corp. v.
10 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met
11 its burden, the party opposing the motion may not rest upon mere
12 allegations or denials in the pleadings, but must set forth specific
13 facts showing that there exists a genuine issue for trial. Anderson
14 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the
15 parties may submit evidence in an inadmissible form – namely,
16 depositions, admissions, interrogatory answers, and affidavits –
17 only evidence which might be admissible at trial may be considered
18 by a trial court in ruling on a motion for summary judgment. FED.
19 R. CIV. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d
20 1179, 1181 (9th Cir. 1988).

21 In deciding whether to grant summary judgment, a court must
22 take three necessary steps: (1) it must determine whether a fact is
23 material; (2) it must determine whether there exists a genuine issue
24 for the trier of fact, as determined by the documents submitted to
25 the court; and (3) it must consider that evidence in light of the
26 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary
27 judgment is not proper if material factual issues exist for trial.

1 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.
2 1999). "As to materiality, only disputes over facts that might
3 affect the outcome of the suit under the governing law will properly
4 preclude the entry of summary judgment." Anderson, 477 U.S. at 248.
5 Disputes over irrelevant or unnecessary facts should not be
6 considered. Id. Where there is a complete failure of proof on an
7 essential element of the nonmoving party's case, all other facts
8 become immaterial, and the moving party is entitled to judgment as a
9 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a
10 disfavored procedural shortcut, but rather an integral part of the
11 federal rules as a whole. Id.

12 13 III. Discussion

14 **A. Legal Standard**

15 According to the terms and conditions of sale ("Terms and
16 Conditions") attached to the invoices, this case is governed by New
17 York law. (Christensen Decl. Ex. 4 (#24-3).) In New York, pursuant
18 to Uniform Commercial Code ("UCC") § 2-601, "if the goods or the
19 tender of delivery fail in any way to conform to the contract," a
20 breach has occurred and a buyer may reject the goods and cease
21 performing under the contract. Night Operations undisputedly
22 accepted the goods, but such acceptance, according to Night
23 Operations, was under protest and due to its need for the products
24 despite their non-conformity and delayed delivery. Night Operations
25 also alleges that it was fraudulently induced to enter into the
26 contract because Arrow represented that the delivery would be on
27 time with conforming goods, and Night Operations was also induced

1 into buying more parts than it required because of alleged
2 misrepresentations by Arrow.

3 “While the buyer may no longer reject goods after acceptance
4 occurs, all other Code remedies for breach and non-conformity are
5 available.” Phone Card America, Inc. v. Quality Discount Equipment
6 Sellers, LLC, 910 N.Y.S.2d 408, 2010 WL 1576833 at *3 (N.Y.Sup.
7 April 20, 2010) (citing UCC § 2-607). Under the UCC, “a buyer may
8 cross-claim for damages but also seek diminution or extinction of
9 the purchase price.” Murray Hill Apparel, Inc. v. Yunsa, 856
10 N.Y.S.2d 499, 2008 WL 123795 (N.Y. City Civ. Ct. Jan. 14 2008).
11 “[A] buyer may defeat or diminish a seller’s substantive action for
12 goods sold and delivered by interposing a valid counterclaim for
13 breach of the underlying sales agreement.” Hooper Handling, Inc. v.
14 Jonmark Corp., 701 N.Y.S.2d 577, 578 (N.Y.A.D. 4 Dept. 1999)
15 (quoting Created Gemstones, Inc. v. Union Carbide Corp., 391 N.E.2d
16 987, 989 (N.Y. 1979)). When a defendant does so and raises “a
17 significant issue regarding the nonconformity of the goods shipped
18 to it by plaintiff” such an issue could “significantly diminish or
19 negate plaintiff’s recovery.” Hooper Handling, 701 N.Y.S.2d at 578.

20 **B. Material Issues of Fact**

21 1. Minimum Order Requirement

22 Night Operations alleges that Arrow falsely represented that
23 there was a required minimum order for the parts it required. Arrow
24 denies that the representation was false, and claims that even if it
25 were false, the issue is irrelevant to whether Arrow breached the
26 contract, as any such fraud could only speak to a problem in the
27 formation of the contract. Arrow is correct. Regardless of whether
28

1 or not there was a required minimum order, Night Operations agreed
2 to purchase the minimum amount, and entered into a contract to do
3 so. This issue does not excuse Night Operations from paying the
4 agreed-upon purchase price.

5 Night Operations' argument appears to be that it was "misled
6 and/or induced to enter into the Agreement by misrepresentation
7 and/or fraud" by the minimum order requirement, which changed the
8 price and caused a delay in the manufacture and delivery of the
9 parts. (Opp. at 6 (#27).) According to Night Operations, this
10 "constituted a breach/lack of performance by Plaintiff" and
11 "constitutes a breach of the duty of good faith and fair dealing by
12 Plaintiff." (Id.) We are unable to see the fraud in this act, even
13 if Arrow did not normally have a minimum order requirement, and
14 imposed one only on Night Operations. Night Operations argues that
15 it needed fewer than the minimum requirement, and therefore was
16 falsely induced into buying too many. However, a statement that a
17 company requires a certain minimum order for a certain part does not
18 appear to be false inducement, as it does not promise any false
19 benefit to induce a purchaser into buying. At that stage of
20 negotiations, Night Operations was still free to walk away from the
21 bargain and buy from a seller with no minimum requirement. Instead,
22 Night Operations, knowing that Arrow required a minimum order that
23 did not fit Night Operations' needs, entered into a purchase
24 agreement to purchase and pay for that minimum order. Whether or
25 not there truly is a minimum order requirement under Arrow's
26 policies is irrelevant to the issue of whether Night Operations must
27 pay for the parts that it ordered and accepted and agreed to pay

1 for, and therefore we disagree with Night Operations that there is
2 material issue of fact regarding whether Arrow fraudulently induced
3 Night Operations into entering into a purchase agreement.

4 2. Late Delivery

5 There is a dispute concerning the agreed-upon delivery date.
6 Night Operations alleges that it required a delivery within a
7 certain timeframe due to an urgent order from the United States
8 Department of Defense. According to Night Operations, Arrow assured
9 it that Arrow would modify current inventory to meet Night
10 Operations' functional requirements and deliver the products within
11 the requested timeframe. It is not until later, after it was too
12 late for Night Operations to find a substitute supplier, that Arrow
13 allegedly came to Night Operations and announced that because the
14 products were being made from scratch, and because of component
15 material shortages, Arrow's delivery would be delayed past Night
16 Operations' critical deadline. Night Operations then had to accept
17 the products as-is, and had to modify them in-house to meet their
18 functional requirements at additional cost. Arrow claims that it
19 communicated that the parts, which had to be customized to Night
20 Operations' specifications, had a lead time of 12-14 weeks before
21 delivery.

22 Night Operations' argument regarding a delayed delivery date
23 fails because the purchase order agreement specifies a final
24 delivery date of November 22, 2009. (Moore Decl. Ex. 4 at 16 (#24-
25 5).) At the hearing held on June 22, 2011, counsel for Arrow
26 clarified that the purchase order agreement pertained to the two of
27 the thirty-one invoices that Night Operations alleges involved late
28

1 and non-conforming delivery. Night Operations did not contest that
2 statement, and therefore we assume that the purchase order agreement
3 and its terms apply to the two invoices at issue here.

4 Night Operations signed the purchase order agreement, which
5 specified that "[i]f a final delivery date is specified on Exhibit
6 A, you agree to accept delivery of the entire quantity of products
7 on or before that date or as soon thereafter as we are able to
8 deliver such products." Id. The allegedly delayed parts were
9 delivered on October 29, 2009 and November 10, 2009, well before the
10 final delivery date of November 22, 2009. Night Operations' claim
11 that the unspecified timeframe within which it required the products
12 was a "time is of the essence inconsistent additional term"
13 contradicts the purchase order agreement which explicitly stated a
14 final delivery date of November 22, 2009. See Kabbalah Jeans, Inc.
15 v. CN USA Intern, Corp., 907 N.Y.S.2d 438, 2010 WL 1136511 at *5
16 (N.Y. Sup. Ct. Mar. 24, 2010). The parol evidence rule in UCC § 2-
17 202 "bars any such proof of an alleged oral agreement between the
18 parties that would vary the terms of the purchase orders, which were
19 the final written expression of the parties' contract." Id.; see
20 also Kay-Bee Toys Corp. v. Winston Sports Corp., 625 N.Y.S.2d 208,
21 210 (N.Y. App. Div. 1995).

22 Night Operations contends that there was an entirely new
23 contract that abrogated the old contract. We do not agree. There
24 is no evidence of a new contract. The affidavits merely support the
25 possible existence of oral terms, inconsistent with the purchase
26 order agreement. The rule on parol evidence in New York prohibits
27 such evidence when the parties sign a purchase order agreement.

1 Kay-Bee Toys, 625 N.Y.S.2d at 210. An affidavit also suggests that
2 Arrow allegedly admitted to the power components being delayed.
3 (Murphy Decl. Ex. 1, at 4 (#27-1).) However, as noted above, the
4 components were ultimately delivered before the final delivery date
5 specified on the purchase order agreement. Night Operations does
6 not dispute that the purchase order agreement was signed by it, and
7 after any oral discussions regarding the terms of the purchase.
8 Night Operations does not allege that it made any objection to the
9 final delivery date included in the purchase order agreement.
10 Therefore, we cannot find that there is a material issue of fact
11 regarding late delivery of the products, when the purchase order
12 agreement stated a final delivery date later than the actual
13 delivery date of the products.

14 3. Delivery of Non-Conforming Goods

15 Night Operations finally alleges that Arrow breached the
16 contract by delivering non-conforming goods that Night Operations
17 was forced to modify in-house due to its strict deadlines at
18 additional cost. The non-conforming goods were power components
19 delivered on October 29, 2009, and November 10, 2009, concerning
20 only two of the thirty-three unpaid invoices at issue in this case.
21 The power components were the subject of Invoice Nos. 6107680 and
22 6189776. While Arrow insists that acceptance of the goods requires
23 Night Operations to pay the agreed-upon purchase price, Arrow is
24 incorrect. Acceptance of the goods does not bar a buyer from
25 bringing suit for damages or to reduce the purchase price when the
26 goods were non-conforming. Phone Card America, 2010 WL 1576833 at
27 *3. While UCC § 2-719(1) (a) "permits an agreement to limit a
28

1 buyer's remedies 'to repair and replacement of non-conforming goods
2 or parts,' UCC 2-719(2) provides that '[w]here circumstances cause
3 [such] an exclusive or limited remedy to fail of its essential
4 purpose, remedy may be had as provided in this chapter,'" including
5 such remedies as "cover, rejection, revocation, and the recovery of
6 compensatory, consequential, and incidental damages, pursuant to UCC
7 §§ 2-711, 2-714, and 2-715." New York Trans Harbor LLC v. Derecktor
8 Shipyards Conn., LLC, 841 N.Y.S.2d 821, 2007 WL 1532293 at *8 (N.Y.
9 Sup. 2007) (citations omitted). Under UCC §§ 2-714 and 2-715, after
10 non-conforming goods have been accepted, a buyer may recover
11 incidental damages such as any "reasonable expense incident to the
12 [seller's] delay or other breach." Id. at *9. In this case, while
13 Night Operations did accept the goods, it has demonstrated that
14 there is a material issue of fact over whether Arrow breached the
15 contract by delivering non-conforming goods, and therefore summary
16 judgment is not warranted.

17 We note that Night Operations has not filed a counter-claim for
18 damages. Night Operations, may, however, be entitled to seek
19 reduction of the agreed-upon purchase price if able to prove damages
20 at trial.

21 The material issue of fact only concerns Invoices No. 6107680
22 and 6189776. (Moore Decl. Ex. 5 (#24-5).) Night Operations has not
23 alleged that any other goods were non-conforming. Because Night
24 Operations has failed to raise any issue of material fact regarding
25 the remaining thirty-one invoices, summary judgment shall be granted
26 on those invoices.

27 ////

C. Night Operations' Affirmative Defenses

In addition to its claim that Arrow breached the contract by delivering non-conforming goods, Night Operations sets out a number of affirmative defenses in its answer (#10) that Arrow claims must be dismissed.

As an initial matter, we note that Night Operations' answer (#10) failed to plead any specific facts or allegations to support its affirmative defenses. Instead, Night Operations included a list of defenses such as the statute of frauds, waiver, laches, unclean hands, estoppel, and accord and satisfaction. Arrow alleges that Night Operations' answer (#10) is insufficient to plead affirmative defenses under the requirements of Rule 8(c). However, Rule 8(c) requires only that a party "must affirmatively state any avoidance or affirmative defense" and does not provide how much detail a party must provide in stating an affirmative defense. FED. R. CIV. P. 8(c). A simple allegation that a plaintiff's claims are barred by a certain affirmative defense is adequate, unless the pleading falls under the category of fraud, mistake, or denial of conditions precedent. See, e.g., Wyshak v. City National Bank, 607 F.2d 824, 827 (9th Cir. 1979); Smith v. Wal-Mart Stores, No. C 06-2069 SBA, 2006 WL 2711468 at *12 (N.D. Cal. Sep. 20, 2006).

The parties do not address the issue of whether Twombly and Iqbal, the recent Supreme Court cases requiring more than bare assertions in a complaint, apply to affirmative defenses contained in an answer. Appellate courts have not ruled on this issue, and district courts are split. See, e.g., Falley v. Friends University, No. 10-1423-CM, 2011 WL 1429956 at *4 (D. Kan. Apr. 14, 2011)

1 (concluding that the pleading standards of Twombly and Iqbal should
2 be limited to complaints and not extended to affirmative defenses);
3 Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647 at 650 (D. Kan.
4 2009). However, because the motion before the Court is one for
5 summary judgment, we must consider whether Night Operations has
6 produced affirmative evidence and specific facts in support of its
7 affirmative defenses sufficient to defeat a motion for summary
8 judgment, rather than merely whether Night Operations' pleadings are
9 sufficient to defeat a motion to strike under Federal Rule of Civil
10 Procedure 12(f), which was not filed in this case. See Benavidez v.
11 Gunnell, 722 F.2d 615, 617 (10th Cir. 1983).

12 1. Statute of Limitations

13 Night Operations' statute of limitations defense fails as a
14 matter of law because New York provides a six-year statute of
15 limitations for actions founded upon a contract. N.Y. C.P.L.R. §
16 213. The oldest invoice became due on September 11, 2009. Arrow
17 filed its complaint on March 29, 2010.

18 2. Statute of Frauds

19 Night Operations' statute of frauds defense also fails because
20 the sales here were governed by the invoices and purchase order
21 agreement.

22 3. Waiver, Laches, Unclean Hands, Estoppel, and Accord and
23 Satisfaction

24 Night Operations' barebones pleading becomes problematic when
25 considering its remaining affirmative defenses. Because neither the
26 answer, nor the opposition to the motion for summary judgment,
27 contains any specific allegations relating to these defenses, we are
28

1 unable to evaluate the sufficiency of these defenses. While a short
2 statement of an affirmative defense is generally sufficient under
3 Rule 8(c), Night Operations' method of pleading these defenses does
4 not give fair notice of the basis of the defenses to Arrow or to the
5 Court. Furthermore, because the motion under consideration here is
6 a motion for summary judgment rather than a motion to strike or to
7 dismiss, Night Operations, as the party with the burden of proof on
8 affirmative defenses, may not merely "rest upon the allegations of
9 [its] pleadings but must set forth specific facts showing that there
10 is a genuine issue for trial." See, e.g., Benavidez, 722 F.2d at
11 617; Midwest Petroleum Co. v. American Petrofina, Inc., 603 F.Supp.
12 1099, 1109 (E.D. Mo. 1985).

13 **D. Attorney's fees and Costs**

14 Arrow further argues that under the Terms and Conditions, the
15 credit application signed by Night Operations, and applicable law,
16 Arrow is entitled to collect the costs and attorney's fees incurred
17 to collect the amounts due under the invoices. (Memo for MSJ at 12
18 (#24).) Because there exist issues of material fact sufficient to
19 defeat the motion for summary judgment and the case remains open, we
20 decline to award any costs or fees at this time.

21

22 **IV. Conclusion**

23 Arrow's motion for summary judgment (#23) will be granted in
24 part and denied in part. Arrow is not entitled to summary judgment
25 on its claims for breach of contract, quantum meruit, account, and
26 promissory estoppel because there exists a genuine issue of material
27 fact regarding whether Arrow delivered non-conforming goods that

28

1 caused damages to Night Operations in relation to Invoices Nos.
2 6107680 and 6189776. Night Operations' acceptance of those goods
3 does not bar Night Operations from seeking damages or a reduction of
4 the purchase price. Arrow is entitled, however, to summary judgment
5 on the remaining invoices because Night Operations has failed to
6 raise any issue of material fact concerning the remaining goods.

7 Night Operations' affirmative defenses of statute of
8 limitations and statute of frauds fail as a matter of law and must
9 be dismissed. Night Operations' affirmative defenses of waiver,
10 laches, unclean hands, estoppel, and accord and satisfaction fail to
11 meet the specific pleading requirements of giving fair notice to
12 Arrow, and must be dismissed on that basis, and also because Night
13 Operations failed to set forth any specific facts showing that there
14 is a genuine issue for trial on those affirmative defenses. Night
15 Operations' claim of a breach of the covenant of good faith and fair
16 dealing must be dismissed because New York law does not recognize
17 such a cause of action separate from a breach of contract claim when
18 the conduct is governed by a provision in the contract.

19 Arrow's request for attorney's fees and costs is denied without
20 prejudice because the action will proceed on the issue of whether
21 Arrow delivered non-conforming goods in breach of the contract on
22 two of the thirty-three invoices.

23

24 **IT IS, THEREFORE, HEREBY ORDERED** that Arrow's motion for
25 summary judgment (#23) is **GRANTED IN PART AND DENIED IN PART** on the
26 following basis: Arrow is not entitled to summary judgment on its
27 claims relating to Invoices 6107680 and 6189776, but is entitled to

28

1 summary judgment on the remaining invoices. Night Operations'
2 affirmative defenses are dismissed. The request for attorney's fees
3 and costs is denied.

4
5 **It IS FURTHER ORDERED** that Arrow shall submit, within twenty-
6 eight (28) days after the date of filing of this Order, a proposed
7 order determining the amount of damages relating to the thirty-one
8 invoices upon which summary judgment was granted. Night Operations
9 may file objections within fourteen (14) days after the proposed
10 order is filed, and Arrow may reply in support of its proposed order
11 within seven (7) days after Night Operations files its objections.

12
13
14 DATED: July 1, 2011.

15 
16 UNITED STATES DISTRICT JUDGE